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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 286.

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

STEAMTUG TALISMAN,
THE LONG ISLAND RAILROAD COMPANY,
Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

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I

THE OPINIONS OF THE COURTS BELOW

This is a review on writ of certiorari of a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit, reversing a decision of the District Court for the Southern District of New York and dismissing petitioner's libel against the steamtug *Talisman*, owned by respondent.

The opinion of the District Court was rendered on June 30, 1931, and is printed at pages 8-10 of the record. It is reported in 52 F. (2d) 691.

The opinion of the Circuit Court of Appeals was rendered on April 4, 1932, and will be found at pages 15-19 of the record. It is reported in 57 F. (2d) 144.

II

Statement of the Case

Petitioner is the owner and operator of a float used for transporting railroad cars by water, known as carfloat *No. 37*. Respondent is the owner and operator of steamtug *Talisman*. Respondent also operated a terminal at Long Island City, New York, for the loading and unloading of carfloats (R. 6-7).

On October 29, 1926, respondent's steamtug *Talisman*, with a carfloat in tow, came into collision with petitioner's carfloat *No. 37*, which was lying moored at respondent's Long Island City terminal, resulting in damage to petitioner's carfloat (R. 2, 6).

It was stipulated between the parties that the collision was occasioned by negligence of respondent's tug *Talisman;* that petitioner and respondent were at the time of the accident common carriers engaged in interstate commerce, and that respondent received petitioner's carfloat *No. 37* at respondent's terminal in connection with the transportation in interstate commerce of freight cars and freight (Stipulation, R. 6-7).

It was also stipulated that petitioner duly received by registered mail from respondent a notice dated July 31, 1920, and that petitioner made no reply thereto. The notice reads as follows:

"We beg to inform you that it has become necessary to cease being responsible for vessels lying at our terminals, Long Island City and Bay Ridge, Brooklyn.

"On and after September 1, 1920, the following conditions will apply to all floating equipment lying at Long Island Rail-

road Company terminals, Long Island City and Bay Ridge, Brooklyn; All vessels, floats, craft or any kind of floating equipment, lying at the Long Island Railroad terminals, Long Island City or Bay Ridge, Brooklyn, are at the risk of the vessel, float, or craft.

"This company will not be responsible for any damage received by said floating equipment while lying at the above mentioned terminals, whether said damage arises through the negligence of this company and/or its employees, or through other causes.

"This notice applies to all floats whether in charge of a floatman or not, while lying moored at the Long Island Railroad Company terminals, Long Island City or Bay Ridge, Brooklyn" (R. 7).

Respondent's defense to the suit is based on the notice set forth above, the validity of which is the only question in this case.

District Court Opinion

The District Court held that the notice was not a valid defense, relying upon the decision of the City Court of the City of New York in *B. & O. Railroad Co.* v. *Long Island Railroad Co.* (the *Patchogue*), 126 Misc. 474, where the Court said:

"Plaintiff, willy-nilly in the instant case had to deal with the defendant at its terminal. Defendant was acting as a common carrier pure and simple, and the service rendered to floats with freight cars. While serving the public, including the plaintiff company, as such, defendant cannot 'exempt himself from the consequence of his own or his servants' negligence' (citing case)" (pp. 477-8).

The District Court accepted the above reasoning, saying:

"Both libellant and claimant are common carriers in the transportation of interstate commerce, and libellant, in the discharge of the duty it owes to the public, is compelled to

send its boats to the terminal which claimant is required by law to maintain for the interchange of interstate traffic" (R. 10).

Circuit Court of Appeals Opinion

The Circuit Court of Appeals in reversing the decision of the District Court and dismissing the libel held that the parties were not in the relationship of a common carrier to a shipper or passenger, but were in the relationship of two connecting carriers, saying:

"But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. *Central R. Co. of New Jersey* v. *Anchor Line* (C. C. A.) 219 F. 716" (R. 17-18).

The Court further held that petitioner assented to the terms of respondent's notice of July 31, 1920, by not replying thereto or going before the Interstate Commerce Commission, as the Interstate Commerce Act contemplated petitioner might do if dissatisfied (R. 18-19).

III

ARGUMENT

Summary of Argument

We shall argue that:

1. The relationship between the parties was not that of common carrier to shipper, but of one common carrier to another in which each stood on equal footing with regard to the other and the common law rule with regard to contracts against liability for negligence applicable to the first relationship, viz., that of common carrier to shipper, have no application to or bearing on the relationship in the instant case.

2. But for the provisions of Interstate Commerce Act, Sec. 3, pars. 3 and 4, petitioner would have no right to interchange traffic with respondent or to use respondent's terminal except with respondent's consent.

3. Petitioner's remedy in case of dissatisfaction with terms upon which respondent allowed use of its terminal was to appeal to the Interstate Commerce Commission.

4. There was valid consideration.

5. The notice of July 31, 1920, relieved respondent from liability for negligence.

6. The Towage and Pilotage cases are not in point.

FIRST POINT

THE RELATIONSHIP BETWEEN THE PARTIES WAS NOT THAT OF COMMON CARRIER TO SHIPPER OR PASSENGER BUT THAT OF ONE COMMON CARRIER TO ANOTHER IN WHICH NEITHER HAS AN ADVANTAGE AND BOTH ARE TREATED AS EQUALS.

It is important at the outset to state clearly the relationship between the parties. There is a clear cut distinction between the relationship of a common carrier to a shipper or passenger on the one hand and the relationship of one common carrier to another on the other hand. In the instant case both parties were common carriers engaged in interstate commerce (R. 6). Petitioner was not a shipper or a passenger on the line of respondent. Both were engaged in the same business and were dealing with each other in regard to the transaction of that business and with particular reference to the use of respondent's terminal by petitioner. In this situation the parties are treated as equals.

Whatever may be the limitations upon a carrier's right to contract while serving the public, *i. e.*, shippers and passengers, no such limitation exists as between connecting carriers. As against shippers and passengers, public policy often forbids the carrier from exempting itself from negligence, but this principle does not apply to the dealings between connecting carriers which are deemed equals, neither of which is entitled to special privileges or protection from the law. They may make whatever contracts they please for the division of responsibility or risk as between themselves.

In *Central R.* v. *Anchor Line,* 219 Fed. 716 (C. C. A. 2), the Court said:

"The interstate commerce law is not intended for the benefit of carriers, but to protect passengers, shippers and consignees * * *."

"Indeed, as between the carriers, there is no public policy as to which of them should bear any particular charge" (p. 718).

See

Baltimore & Ohio, etc., Ry. v. *Voigt,* 176 U. S. 498;
Wells Fargo & Co. v. *Taylor,* 254 U. S. 175;
Santa Fe Ry. v. *Grant Bros.,* 228 U. S. 177, 185;
Hartford Fire Ins. Co. v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 175 U. S. 91.

As the Court below said:

"But the rule limiting the right of a common carrier to contract against its own negligence in dealing with passengers and shippers does not necessarily apply to dealings between connecting carriers, who are in many aspects treated as equals, neither of which is entitled to any special privileges or protection in the making of contracts. *Central R. Co. of New Jersey* v. *Anchor Line* (C. C. A.) 219 F. 716" (R. 17-18).

The cases, therefore, dealing with the liability of a carrier to a passenger or a shipper have no bearing on the instant case because there is no public policy which precludes respondent from limiting its liability for damage to petitioner's equipment by negligence. We are here concerned with the use by one carrier of the terminal of another. There are two ways in which petitioner's float could be using respondent's terminal, (1) it could be using the terminal for an interchange of traffic, or (2) it could be using the terminal for a mooring place until towed away. Whether or not petitioner's float went to respondent's terminal for the purpose of interchanging traffic or some other purpose, it is clear that it was using respondent's terminal facilities. Neither of the uses enumerated involves the duty of a common carrier to the public, *i. e.,* a shipper or a passenger. Both uses are

entirely outside the concern of the general public; they concern only the parties who are both common carriers it is true, but neither of whom is entitled to any advantage in dealing with the other.

Santa Fe Railway v. *Grant Bros.*, 228 U. S. 177, 184-5.

SECOND POINT

PETITIONER HAD NO RIGHT UNDER THE COMMON LAW TO COMPEL RESPONDENT TO INTERCHANGE TRAFFIC WITH IT OR TO USE RESPONDENT'S TERMINAL. THESE RIGHTS ARE PROVIDED FOR IN INTERSTATE COMMERCE ACT, SEC. 3, PARS. 3 and 4.*

This Court has held that at common law there was no obligation upon one carrier to interchange traffic with another carrier even though there was a physical connection between the two railroads and this doctrine is broad enough to cover the use of the terminal of one carrier by another carrier.

Atchison, T. & S. R. R. Co. v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667, 680.

Even after the passage of the Act to Regulate Commerce, which is now the Interestate Commerce Act, the Courts allowed carriers to make their own arrangements with regard to the use of their facilities by other carriers.

In *Oregon Short Line & U. N. Ry. Co.* v. *Northern Pac. R. Co.*, 51 Fed. 465; affirmed 61 Fed. 158 (C. C. A. 9), appeal dismissed 17 S. Ct. 997, 41 L. Ed. 1182, the Court construing section 3 of the Act (now §3, par. 3), said:

"* * * a common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities

* Printed in Appendix A attached to this brief.

with one or more connecting lines, without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests" (pp. 474-5).

See also:

The Express Cases, 117 U. S. 1;
Kentucky & I. Bridge Co. v. *Louisville & Nashville R. Co.*, 37 Fed. 567, 620.

Paragraph 3 of Section 3 of the Interstate Commerce Act is headed "Interchange of Traffic" and deals with that subject. It provides for the furnishing of "reasonable facilities for the interchange of traffic" and declares that there shall be no discrimination between connecting lines. There is nothing in this section which prohibits carriers from making such agreements or contracts with regard to the interchange of traffic as they see fit. There being no prohibition in the statute against the carriers making such contracts as they see fit, there is certainly no prohibition against one carrier stipulating that it will not be liable for negligent damage to the property of another carrier.

Paragraph 4 of Section 3 is headed "Terminal Facilities; use of and compensation for". It provides for the use of terminal facilities of one carrier by another "on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, * * *". Nothing is to be found in this paragraph which would prevent one carrier stipulating against its liability for damage by negligence to the equipment of another carrier.

In *Pittsburgh & W. V. Ry. Co.* v. *United States,* 41 F. (2d) 806, affirmed, 281 U. S. 479, construing paragraph 4, the Court said:

"We are of opinion that in amicable arrangements between carriers for the joint use of terminal facilities, this section supersedes the previous requirement of law, if any, as to exact similarity in terms and empowers the railroads to agree upon terms which are just and reasonable, taking into consideration the financial condition of the contracting parties, the ability to pay, the use required, and all other surrounding circumstances" (p. 810).

As the Court below said:

"Under Interstate Commerce Act, § 3, par. 3, 49 U. S. C. A. § 3 (3), carriers engaged in the transportation of passengers [fol. 31] or property must afford reasonable facilities for the interchange of traffic between their respective lines.

* * * * * * *

"Under section 3, par. 4, of the Interstate Commerce Act, connecting carriers are at liberty to agree upon 'terms' for the use of terminal facilities. By reason of the notice received by the New York Central without comment, we must hold that it acquiesced in the 'terms' indicated in the notice, and that, when it sent its car float to the terminal, it contracted that the Long Island Railroad should be free from liability for damages suffered through the latter's negligence.

"The meaning of the word 'compensation' in paragraph 4 might be restricted to charges to be paid for furnishing 'terminal facilities'. But the word 'terms' is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them" (R. 18).

THIRD POINT

PETITIONER'S REMEDY IN CASE OF DISSATISFACTION WITH RESPONDENT'S TERMS AS STATED IN ITS NOTICE OF JULY 31, 1920, WAS TO APPEAL TO THE INTERSTATE COMMERCE COMMISSION.

There can be no doubt that petitioner was under no obligation to accept the terms offered if it was dissatisfied. However, petitioner remained silent and thus acceded to the terms of the notice.

As the Court below said:

"* * * We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly contemplates that it may do this" (R. 18-19).

Petitioner now contends that paragraph 4 has no application and that paragraph 3 alone is applicable (Petitioner's Brief, p. 13). The stipulation does not support petitioner's contention. Certainly the stipulation fails to show that the situation comes under paragraph 3. It is equally consistent that it comes under paragraph 4 and, indeed, rather indicates that it does come under paragraph 4.

Even if the situation came under paragraph 3, respondent was not precluded by any controlling principle of law from stipulating against liability for its own negligence, when the question involved is an apportionment of risk between two connecting carriers. Such an apportionment of risk depends upon many different circumstances which may vary greatly.

There are many considerations which go into a determination of use of respondent's terminal and the terms of such use, viz., whether the respondent has room for petitioner's floats; whether petitioner has room and how it handles floats at its own terminal; the dangers of navigation at each terminal; the facilities for handling the different kinds of floats at each terminal, and the complications which may arise in case of respondent taking care of its own business at its terminal if the additional hazard of taking care of petitioner's business is introduced. It could well be that the hazard of allowing floats to lie at respondent's terminal was so great under the conditions in that part of the harbor that respondent insisted that petitioner's floats should lie only at petitioner's terminal, and that where petitioner's floats were sent to and allowed to lie at respondent's terminal it must be upon the terms stated in the notice dated July 31, 1920. All such questions and considerations must enter into the reasons for stating the terms. There is no common law duty in such circumstances, and the question is one purely of contract between the parties or otherwise of a statutory command that the service be accorded upon the terms fixed by public authority.

This would be true even if the question was as to liability at the particular time and place for damage to the property of a shipper being interchanged at the moment between one carrier and the other. At the moment of such interchange there would be countless circumstances which might properly affect a decision as to which of the connecting carriers should share the risk at that moment, and the stipulation throws no light at all on that question.

But this is not a case of liability for property belonging to a shipper and being interchanged between one connecting carrier and another. The case involves solely the custody

or handling of equipment belonging to one common carrier and temporarily in the possession of the other common carrier. When two rail carriers interchange freight on land, the locomotive of one carrier must ordinarily be on the track of the other at the time and place of interchange. Many different circumstances might affect what was reasonable and proper as to which carrier should bear the risk of injury to that equipment at the time of such interchange of equipment. There is no principle of law which prohibits one carrier from stipulating that even in event of its own negligence the other carrier shall be liable for such loss. A great range of possible facts may bear on what is reasonable under such circumstances.

This is even clearer where the case is not one of two connecting tracks of two railroad companies in which event any required interchange must be at or in the immediate vicinity of the point of connection. In the instant case there is a considerable intervening space of water carriage. Presumably the interchange could be at the petitioner's end of the water transportation or at respondent's end and this introduces a still greater choice as to specific place of interchange and as to how the risks should be shared. It certainly cannot be declared as a principle of law independent of due hearing and finding by the Interstate Commerce Commission that under no circumstances can one of the carriers involved stipulate that in event of its own negligence the other carrier shall assume the risk incident to interchange of its own equipment with the other. These are very intricate, practical and technical questions which presumably are adjusted along with countless other practical questions when the equipment of one carrier is temporarily in the possession of another as an incident to interchange of property in connection with the interchange of freight traffic.

There is nothing to indicate that the petitioner had no choice as to any other point at which its equipment could be turned over to respondent for the purpose of effecting an interchange. The instant case may have been a situation where it was more agreeable to both parties to use petitioner's floating equipment for interchange at respondent's terminal than to use respondent's floating equipment for an interchange of shipments at the petitioner's terminal. The sending of petitioner's equipment to respondent's terminal may have been a circumstance acceptable to both carriers and this might explain six years' acquiescence by petitioner in the notice given by respondent.

Even if the stipulation made these points clear, they involve questions of reasonableness and propriety not settled absolutely by any general principle of common law so as to be enforced by the Court but call for hearing and determination by the Interstate Commerce Commission as a tribunal enlightened by experience and aided by the special machinery appropriate for the arriving at a proper conclusion as to reasonableness and propriety. This is further borne out by the procedure in rate cases under the Interstate Commerce Act. The act provides that rates shall be reasonable. The question of reasonableness of a rate is always a question for the Interstate Commerce Commission. So also under paragraph 3 the reasonableness and propriety of facilities for the interchange of traffic is a question for the Commission.

There has been no attempt to "exclude" petitioner's carfloats from the use of respondent's terminal as contended by petitioner (Brief, p. 7). The imposition of conditions does not constitute exclusion. If the conditions were not acceded to (as they were), petitioner had the right to review by the Interstate Commerce Commission. As the Court below said:

"The common law does not inhibit the contract, and the Interstate Commerce Act recognizes the right to make it. If

Congress had intended further limitations upon the power to contract, it would doubtless have imposed them. Accordingly, the parties are in a position where, as was said in *Gooch* v. *Oregon Short Line R. R. Co.*, 258 U. S. 22, 42 S. Ct. 192, 193, 66 L. Ed. 443, Congress must have been 'satisfied to leave them to the Interstate Commerce Commission and the common law' " (R. 19).

FOURTH POINT

THERE WAS VALID CONSIDERATION

Petitioner contends that respondent offered petitioner only the facilities it was bound to offer and there was no consideration to support a contract because the act of petitioner in sending its float to respondent's terminal was not voluntary, and was consequently of no significance as an indication of acceptance of respondent's terms (Petitioner's Brief, p. 13).

On the contrary petitioner was not obligated to send its float to respondent's terminal. This was entirely a matter of agreement between the parties. Petitioner could have arranged for the delivery of the cars to respondent at petitioner's terminal, or they could have agreed upon exchanging the cars from petitioner's float at some other point in the harbor, or, for that matter, in the middle of the East River. The arrangement as made was for petitioner's float to be sent to respondent's terminal, and the terms were accepted by petitioner. As the Court below said:

"It cannot be said that the Long Island Railroad furnished no consideration for affording terminal facilities, because it was obliged to furnish them in any event. It was not obliged to furnish them upon *any terms*, for, if the Central had refused to accede to its proposal, it could have appealed to the Commission. When it agreed upon terms, it gave up that right. We find nothing in the record indicating that the 'terms' were not freely agreed upon by the two carriers,

though they would have been open to revision if libelant had declined to accede to the arrangement. In such circumstances no rule of public policy is involved" (R. 19).

"The meaning of the word 'compensation' in paragraph 4 might be restricted to charges to be paid for furnishing 'terminal facilities'. But the word 'terms' is broad, and naturally includes everything which may be regarded as a consideration for affording these facilities, including in the present case a relinquishment of claims against the Long Island Railroad for damages occasioned by the not unlikely negligent operations of its tugs about the entrance to the terminal. We think that subdivision 4 clearly shows that the carriers were free to contract as to the terms on which 'terminal facilities' were furnished, and that the New York Central was under no obligation to accept the terms offered if it was dissatisfied with them. It contracted without an appeal to the Commission. The act plainly contemplates that it may do this" (R. 18-19).

Or if petitioner objected to the method of handling its equipment at respondent's terminal or to the terms as set forth in respondent's notice, petitioner could have made arrangements to handle its own equipment and tow it away as soon as loaded or discharged. As said in *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2) cert. denied 273 U. S. 703:

"Under the prevailing practice, it can be found that the appellant expected one of the appellee's tugs to perform this service. While no formal orders for the operation of shifting the float were given, still it must be deemed to have been understood that this work was necessary as a routine in the business and the owner's tacit assent to the conditions may be implied. Undoubtedly the appellant had its choice as to whose tug should do the work. It may have been inconvenient, and perhaps an unnecessary expense, to have its tug at the Long Island Terminal for such use. Appellee was not bound to furnish a tug for bridging or unbridging the float. *Penn. R. Co.* v. *McGirr's Sons Co.* (C. C. A.), 287 F. 334. It did so without compensation (p. 673)."

FIFTH POINT

RESPONDENT WAS RELIEVED OF LIABILITY FOR DAMAGE TO PETITIONER'S FLOAT BY ITS NOTICE OF JULY 31, 1920.

No question is raised as to the receipt of the notice, nor is any contention made that it was not assented to (R. 6-7). The method of making the agreement has been recently approved by this court in *Sun Oil Co.* v. *Dalzell Towing Co. Inc.,* No. 38, decided December 5, 1932.

In *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2), certiorari denied, 273 U. S. 703, a similar notice involving liability for negligent towage was in controversy. There, the damage was to a carfloat at the same terminal. The sending of the notice and the practice of handling floats at the terminal were fully discussed and the conditions of the notice upheld and the Long Island Railroad tug exonerated. The Court said:

"It appears that unbridging was regularly done by the Lehigh Valley Railroad tug, when one happened to be present, but the record does not disclose that there was one present on this occasion. The fact that the service was free does not affect the situation between the parties. The letters made no distinction between free service and that which is paid for. Where service of the bailee or carrier is free, the courts have recognized and imposed conditions exonerating them from liability for carriage. *B. & O. Ry.* v. *Voight,* 20 S. Ct. 385, 176 U. S. 498, 44, L. Ed. 560. The use of the appellee's tug for shifting the appellant's float invoked the condition stated by the owner, and they are binding upon the parties" (p. 673).

In *Graves* v. *Davis,* 235 N. Y. 315 (a towage case), the New York Court of Appeals said:

"A tug is not a common carrier of the tow. The owners of a tug may restrict their liability by special agreement. No

rule of public policy is involved. (*Wells & Tucker* v. *Steam Nav. Co.*, 2 N. Y. 204; *The Margaret*, 94 U. S. 494; *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. Ry. Co.*, 175 U. S. 91, 98, 99). When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest" (pp. 319-20).

In *Ten Eyck* v. *Director General*, 267 Fed. 974 (C. C. A. 2), certiorari denied, 254 U. S. 646 (another towage case), the Court said with reference to the method of imposing terms.

"Notice imposing the conditions under which the tug would be accepted having been received, the railroad company was justified in accepting the towage contract, fully understanding that the libellant agreed to these terms. The terms stated in the notice, therefore, became part of the oral contract entered into for the service" (p. 977).

Petitioner seeks to avoid the effect of the notice by asserting that it is the established doctrine of this Court that common carriers cannot secure immunity from liability for their negligence by any sort of stipulation (Petitioner's Brief, p. 15). However, it is apparent from the authorities referred to, that the doctrine is confined to immunity from liability for negligence to the public. But here we are concerned with the obligations between carriers; there is no question of public policy. (See this Brief, Point I.)

SIXTH POINT

THE TOWAGE AND PILOTAGE CASES ARE NOT IN POINT

Petitioners have referred to certain "towage" and "pilotage" cases* which are in point only in so far as some of them are authority for a similar method of making the contract (discussed under Point V).

A "towage" case is one in which a vessel with propelling power draws another without propelling power. A typical towage service is that performed by a tug in towing a barge or a carfloat. Towage has recently been defined by this Court in *Stevens* v. *White City,* 285 U. S. 195, as follows:

"The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is *towage.* Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to *assist* them in moving about harbors and docks. *Benedict on Admiralty,* 5th ed., § 100" (p. 200).

A "pilotage" case is one in which a vessel (such as a steamer) which uses her own propelling power is assisted by a tug or tugs in performing a manœuvre, the pilotage consisting of orders from a pilot, who goes on the steamer's bridge and directs the entire manœuvre, *i. e.,* gives orders for the movement of the helm and engines of the steamer, as well as the position and movements of the assisting tug or

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* TOWAGE CASES

Ten Eyck v. *Director General,* 267 Fed. 974 (C. C. A. 2); certiorari denied, 254 U. S. 646;

The Cutchogue, 10 F. (2d) 671 (C. C. A. 2); certiorari denied, 273 U. S. 703;

Stevens v. *The White City,* 285 U. S. 195 (Petitioner's Brief, p. 17).

PILOTAGE CASES

Sun Oil Co. v. *Dalzell Towing Co.,* 55 F. (2d) 63 (C. C. A. 2), No. 38 on the docket of this Court, decided December 5, 1932 (Petitioner's Brief, pp. 5, 14, 17, 18).

tugs. The pilot usually comes from one of the tugs. A typical pilotage case is in docking and undocking steamships with the assistance of tugs (see *Sun Oil Co.* v. *Dalzell Towing Co.*, No. 38 on the docket of this Court, decided December 5, 1932).

The instant case is neither one of "towage" or pilotage. Petitioner's carfloat, which was damaged, was lying moored at respondent's terminal (R. 2, 6).

The *Syracuse*, 12 Wall. 167 (Petition, p. 12; Brief, pp. 17, 20) was a *towage* case where the boat was towed under a contract whereby the owner of the tug agreed to bear the risks of the navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill.

"The receipt for the towage—a printed form—was for towing her 'at the risk of her master and owner;' but it seemed that the canalboat had been made fast, the tow put in motion, and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed" (p. 169).

This Court held that the steamboat was not navigated with ordinary care and skill, and she was held at fault.

In *Compania de Navegacion* v. *Ins. Co.* (*The Wash Gray*), 277 U. S. 66 (Petitioner's Brief, pp. 17, 20), the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. S. S. *Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who de-

fended on the ground that the contract above quoted discharged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

Conclusion

Petitioner attempts to read the common law liability for common carrier transportation into a situation where there is no common carrier transportation by respondent, but a duty which arises and responsibilities which exist by statute, whether the statute is Paragraph 4 of Section 3 of the Interstate Commerce Act, if what is involved is the use of respondent's terminal, or Paragraph 3 of Section 3 of the Act, if what is involved is an interchange of traffic between petitioner and respondent. In neither case does the statute preclude exemption from liability due to negligence. Under either section respondent is free from the prohibition existing at common law upon a common carrier exempting itself from its own negligence in connection with the common carrier function of transportation by the carrier whose negligence is sought to be made a ground for liability.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Paul Tison,
Counsel for Respondent.

Dated New York, December 12, 1932.

APPENDIX A

Interstate Commerce Act, Section 3, paragraphs 3 and 4:

"§ 3, par. (3) *Interchange of traffic.* All carriers, engaged in the transportation of passengers or property, subject to the provisions of this chapter, shall according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"§ 3, par. (4) *Terminal facilities; use of and compensation for.* If the commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, or any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be" (49 U. S. C. A. (§ 1-15a) pp. 157-8).